FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM 1942

No. 278

MURRAY R. SPIES,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

DAVID V. CAHILL,
Attorney for Petitioner.

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

MISCELLANEOUS

IN THE

Supreme Court of the United States

OCTOBER TERM 1942

MURRAY R. SPIES, Petitioner, against UNITED STATES OF AMERICA, Respondent.	No.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered July 6, 1942, affirming a judgment of conviction in this criminal cause.

Opinions Below

There was no opinion in the District Court.

The opinion of the Circuit Court of Appeals has not yet been reported, but it is printed at the end of the record submitted herewith. The numbers of the pages are not yet available.

Jurisdiction

The jurisdiction of this court is invoked under Section 24(a) of the Judicial Code, as amended by the Act of February 13, 1925 (Sec. 347, Title 28 U. S. C.).

Questions Presented

1. Whether the wilful omissions (a) to file a return of income and (b) to pay a tax thereon, defined as misdemeanors in Section 145(a) of the Internal Revenue Law, of themselves, without the addition of any other element, constitute the felony of attempting to defeat and evade the income tax law, defined in Section 145(b) of the same law.

2. Whether the word "attempts" in Section 145(b) is used in its common law significance of positive and affirmative acts, or is intended by Congress in this statute to have a different and peculiar meaning, including not only positive acts, but also the mere omissions defined in Section 145(a).

3. Whether Section 145(b), if construed as intended to give the word "attempts" a meaning different from its meaning at common law, is not unconstitutional for uncertainty of definition.

4. Whether the trial court did not err in failing to instruct the jury on the effect of petitioner's mental and physical condition on his will power and the wilfulness of his alleged offenses.

Statute Involved

Section 145 of the Revenue Act of May 10, 1934—Penalties.

(a) Any person required under this chapter to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this chapter, who wilfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) Any person required under this chapter to collect, account for, and pay over any tax imposed by this title, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

(c) The term "person" as used in this section includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs. (May 10, 1934, 11:40 a. m., c. 277, Section 145, 48 Stat. 724.)

Statement

The indictment consisted of a single count, alleging that the defendant had wilfully attempted to defeat and evade the income tax law with respect to his income for the calendar year 1936. The petitioner is a lawyer, admitted to practice before the bar of the State of New York. He began his career as an office boy in the office of a distinguished firm in the City of New York (R. p. 934). In 1933 he became associate counsel to a corporation known as Universal Shares. From that time until 1936 he acted as counsel and as trustee for a number of distributing companies for investment trusts, at one time in association with General John F. O'Ryan and also acted as director in one or two smaller companies with which he was connected (pp. 135-136). Mr. Spies received commissions from one or more of the distributing companies, which sold and distributed the stock of investment trusts. By written agreement, on July 11, 1936, he resigned and transferred control of the various distributing corporations to the Weil Management Company and one Kenyon for the sum of $40,000, of which $2,000 was paid by him to another person and $38,000 was retained for himself. This $38,000 plus approximately $2,000 additional income in the form of salary, made up the taxable income for the year 1936, which was the basis of the prosecution.

Under circumstances, which will be recited briefly later, Spies failed to file a return for the year 1936 and failed to pay the tax, but was not prosecuted for these misdemeanors, which are defined in Section 145(a). There is, of course, a question whether under the circumstances the delinquency was wilful. The record shows that Spies consulted an accountant named Rosenberg, who became a Government witness, in connection with his return and the payment of his tax for the year in question (pp. 44-45). On behalf of the petitioner and at his request Rosenberg filed with the Collector of Internal Revenue on March 11,

1937, an application for an extension to file his return. The extension to April 15, 1937, was granted (p. 45). Subsequently on behalf of Spies, Rosenberg again applied for an extension to May 15th and another extension until June 15th was granted (p. 45). On May 15, 1937, the petitioner wrote another letter to the Collector of Internal Revenue in which he stated that he did not know whether or not his accountant had yet filed the return—meaning, of course, a tentative one. For several weeks prior to June 15, 1937, and on that day and subsequent thereto Spies was actually confined to bed under the care of at least two physicians. The correspondence with respect to these extensions is in evidence as Government's Exhibits 8 to 15. Apparently on his own initiative and as a matter of routine Rosenberg also filed on or before March 15, 1937, a tentative return for Spies (Government's Exhibit 18). It contained the word "none" in the space allotted for income and other figures. The accountant testified that in his practice that explanation was used when it was not known how much income there was or how much tax was due (p. 50). The accountant specifically remembered that Spies told him that he had an income for the year 1936 (fol. 150). Rosenberg did not know who signed this tentative return (p. 49). He did not recall any conversation with Spies about writing the word "none" on the tentative return. Rosenberg said that it was possible that Spies may have asked him if the income was so much, how much the tax would be (p. 53).

There was proof that Spies for some years had suffered from a mental and physical condition, which may have contributed to his default in reporting his income and paying his tax. Until the year 1937 Spies had engaged in various activities relating to the corporations in which he was interested, but most of the activities in all probability were of the usual corporate character such as attendance at meetings of directors, there being other directors present. There was evidence also that other persons were employed to handle the affairs of these corporations, such as

investment counsel, legal counsel and managers of various operations. Nevertheless, during the year 1937 and for some time prior thereto and for several years thereafter, Spies was in a serious mental condition and had a physical condition, the seriousness of which was undoubtedly greatly exaggerated in his mind. During the years 1936 and 1937 he consulted from twelve to fifteen physicians. One of them, Dr. Gilman, treated him for a period of years. He found Spies suffering from a condition described technically as "tachycardia". It may be described in simple language as a condition of abnormally rapid heart action. He also had high blood pressure (p. 191). Beginning with the year 1931 Spies' applications for life insurance were rejected by seven or eight different companies. In fact, with the exception of one company, which offered insurance to him in 1932, on condition that he would be rated nine or ten years beyond his actual age, his applications were uniformly denied between 1931 and 1937 (p. 136). In February or March, 1937, in one of the life insurance companies' reports, which was brought to Spies' attention, it was suggested that he had a coronary condition (p. 136). As a result of this he feared that he was going to drop dead at any time (p. 191). He called one of the physicians frequently on the telephone and made personal visits to him for examination When he was about to close the $40,000 transaction in 1936 he called upon Dr. Sharpe to determine whether he was physically capable of going through with the transaction and went through with it only after receiving the doctor's assurance that he could do so (pp. 140-141).

Appellant's disease was diagnosed by Dr. Gilman as "fear psychosis", or "neuro-circulatory asthenia" (p. 192). This diagnosis was confirmed by Dr. Stephen P. Jewett, an expert of high standing in the field of psychiatry and neurology (pp. 226-227). Appellant would not go into subways and was afraid that he was going to jump out of windows (p. 137). He was reluctant to go into restaurants (p. 138). This condition was acute during the year 1937.

There was nothing to indicate that he feigned illness or phobias, or that his condition was conveniently timed. The effect was primarily on his will power (pp. 231-232). Procrastination was one of the characteristics. Even though the intellectual faculties remained fairly clear and active, the condition would naturally interfere with his will power to do what should be done (p. 233). Requests for instructions to the jury on the tests to be applied to this important factor in the case were filed in the trial court (R. fols. 1269-1271, 1181, 1182) but were declined and the subject was not discussed in the court's instructions except in general terms (R. fols. 1215-1216). A specific exception was taken to the refusal to instruct the jury as requested on the subject (fol. 1226).

There were no fraudulent acts and no positive or affirmative acts of concealment or deception on the part of the petitioner alleged or attempted to be proved. The sole circumstance which the Government emphasized in this connection was that Spies had taken the $40,000 in cash at the time when he transferred control of the distributing corporation. The importance of this circumstance has been unduly emphasized throughout this cause. The fact appears to be that there were two checks at the time of the closing of the transaction, one of which Spies never saw, and which was drawn to the order of Kenyon. The other was a check made payable to Spies and endorsed by him on the back. This was the one which he was required to endorse before the cash was turned over to him (p. 113, fols. 338-339). A photostatic copy of this latter check was produced and marked "Exhibit B". For some reason only the face of this check was photostated by the Government and the Government did not produce the back of the check, which bore the endorsement of Spies. Reighley, a Government accountant, who was a witness at the trial, stated that he had seen this entire check and that it was an exhibit before the Securities and Exchange Commission in a proceeding before that body. He did not know where that check was (p. 113, fol. 339). Spies, testifying on his

own behalf, stated that he wanted the check cashed, because it was on a New Jersey bank and he was delivering the closing papers at the time (p. 143). He also stated that he never had a $40,000 transaction before in his life. For that reason he called an armored car in his own name which came to the place of closing, the Lawyers Trust Company, and paid for its use. The money was taken to Lynbrook, where his home was, and deposited in an old established account of his wife, Marie V. Spies, in trust for his son, who bore the same name as himself, Murray R. Spies, Jr.

After receiving the money and in the month of July or August, 1936, petitioner invested $25,000 in an annuity in his own name with the Equitable Life Assurance Society (p. 144). He also made improvident investments of his 1936 income, which by the Summer of 1937 had involved him in serious losses and by the end of that year had wiped out his assets including his recently acquired fortune. In 1936 he had undertaken on his own resources to develop an investment fund program including two corporations. His investment in this business was contracted for in 1936 and, in the main, made during the year 1937. In order to keep up with the commitments on his new investment he first borrowed $12,500 from the Manufacturers Trust Company with his annuity as security (pp. 54-55). Subsequent loans in the year 1937 brought the total borrowed on the security of his annuity policy to the sum of $22,691.50. The annuity policy was sold by the pledge to pay the indebtedness and the balance remaining out of his annuity as a result of unfortunate investments amounted to $718.98. He had previously bought a home for his wife and children. Foreclosure proceedings were begun on his home, but by borrowed money he managed to save it for the time being and then rented the house (pp. 153-154).

By the end of December, 1937, the greater part of the one big fee which he had received in his life, $40,000, "was completely gone" (p. 157). The investment company proposition, which he attempted with his limited means to

finance, failed (ibid.). He then went to work as a stenographer.

At the outset of the trial it was conceded that he had an income of approximately $40,000 for the year 1936 and that there was due as tax upon the income approximately $6,000 (p. 16). There was, therefore, no issue remaining on the question whether there was a taxable income. Nevertheless, the Government attempted to prove a larger amount than the amount conceded and a larger tax due thereon. For the sake of brevity doubtful items included as income will not be discussed. It will suffice to say that the Government investigators arbitrarily treated as income any items which by any stretch of the imagination could be placed in that category including many obvious duplications (pp. 108-109). In one instance Spies definitely informed the Government accountant that a certain $1,500 deposited was money obtained from his brother-in-law. Without examining the brother-in-law or investigating further the Government agents included the item as unexplained income. Much of the testimony relating to this unexplained income was entirely immaterial, could serve no purpose except to introduce an unfavorable atmosphere and will not be discussed further here, because it would not be helpful to the court in considering the questions presented.

Reasons for Granting the Writ

1. The decision of the Circuit Court of Appeals involves the construction of a statute of wide application, which has never been passed upon by this court. The brief opinion of the Circuit Court of Appeals indicates that the judges below affirmed the judgment of conviction only because of a prior decision in that court, and they felt that they must continue so to construe the section "until the Supreme Court decides otherwise". (See opinion at the end of the record.) Judge Learned Hand, one of the

judges on the appeal, states that he believes the dissenting opinion of Judge Alschuler in the case of *O'Brien* v. *United States*, 51 Fed. (2d) 193, 198 is unanswerable. That opinion holds that proof of the felony defined in Section 145(b) is not made out by proving simply that one has failed to report his income and failed to pay the tax within the meaning of Section 145(a). The opinion of the court below in the case at bar practically invites review by this court for the purpose of settling the law. That the statute is of wide application is obvious. The essence of the question presented is whether, assuming the wilfulness of the omissions to file a return and pay a tax, these misdemeanors as defined in Section 145(a) are of themselves and without any additional element sufficient to constitute the felony defined in Section 145(b).

The fundamental question here posed is presented in various forms in the assignment of errors dealing with failure of the court to instruct the jury and denials of the motions to dismiss the indictment, Errors 1-10, 29, 30 and 31 (R. pp. 422-423, 426).

2. The construction of the word "attempt" in the decision below is in conflict with the decision of various states throughout the union and with the common law. When not precisely defined by statute, the word "attempt" has always been given its common law meaning as signifying a positive or affirmative act and not a mere omission.

3. If the word "attempt" in Section 145(b) is construed to include a mere failure to pay a tax or to report as income, there being no such meaning expressed in the terms of the statute itself, the statute is unconstitutional, because it is vague, indefinite and uncertain.

4. Since there was evidence of a mental and physical condition affecting the will power of the defendant and, therefore, directly bearing on the question of wilfulness of his act, the trial court was bound as a matter of law to give adequate instruction as to the tests by which the jury might determine the effect of his condition on the question of wilfulness.

ARGUMENT

The misdemeanors defined in Section 145(a) of the Revenue Act of May 10, 1934, do not constitute the felony defined in Section 145(b), and the evidence offered, tending to prove the commission of the misdemeanors, was not sufficient to establish the felony.

It is not conceded that petitioner committed the misdemeanors defined in Section 145(a). At the outset of his trial petitioner through counsel did concede that he had a taxable income of approximately $40,000 and that there was a tax of approximately $6,000 due thereon. However, the wilfulness of his omissions was not conceded, but that question is unimportant here, because the Government failed to prosecute petitioner for the misdemeanors. Instead they attempted to prove the felony by evidence which, assuming wilfulness, would have established only the misdemeanors. The precise point involved in the present cause was stated with perfect clarity by Judge Alschuler in his dissenting opinion in *O'Brien* v. *United States*, 51 Fed. (2d) 193, 198:

> "I cannot bring myself to believe that it was the intent of Congress by paragraph (a) to constitute the willful failure (1) to pay, (2) to make return, (3) to keep records, or (4) to supply information, misdemeanors subject to the prescribed penalties, and then by paragraph (b) to make the very same failures, without the remotest additional element, felonies subject to the penalties as therein specified" (p. 198).

Further, Judge Alschuler said:

> "Plainly this legislation contemplates that attempt includes something which mere failure or omission does not. That something in my judgment is some affirmative act. Conduct which is wholly and only an omission as defined in (a) falls short of being an attempt as defined in (b). Thus while there is here

present in the indictment and in the proof the willful *omission* of (a), there is entirely wanting the affirmative act to constitute the *attempt* which in my judgment is of the gist of (b). If paragraph (a) made the willful failure to make return a misdemeanor, it is hardly conceivable that Congress intended to make the very same willful failure to make the return a felony" (p. 198).

It was contended on behalf of petitioner in the court below that the logic of this argument is unanswerable and Judge Learned Hand, while finding himself obliged to concur in the affirmance of the conviction below, stated also that the reasoning of the dissenting opinion in the *O'Brien* case appeared to him to be unanswerable.

Apparently the sole obstacle to reversal of the conviction in the court below was the decision of the same Circuit Court of Appeals in *United States* v. *Miro*, 60 Fed. (2d) 58. In that case the court conceded expressly that the mere omission to file a return and pay a tax would not amount to an attempt at common law. But it was argued that for some reason offenses under the Internal Revenue law were to be treated differently from others. The sole suggested reason of the court for that assumption is that the Revenue Act created an affirmative duty of reporting the income and paying the tax and that, therefore, this purely negative thing becomes positive and affirmative and the omission becomes something more than a mere omission.

It was also argued in that opinion that the use of the words "in any manner" indicates an intention to cover all possible methods of evasion and not to require "specific means" as an "exclusive method of such evasion". It would seem that this subject does not bear any relation to the precise point now under consideration. In the misdemeanor statute Congress was definite and specific, because the omissions could be readily defined in Section 145(a). Congress could find no language that would be comprehensive of all the means and manners of evasion

possible to a taxpayer and, therefore, was obliged to use general terms in 145(b). There is no reason for assuming that by these general terms Congress intended to include the specific omissions in Section 145(a), which it had already defined. It may be noted that of the judges who decided the *Miro* case only one participated in the decision of the case at bar.

The word "attempt" implies an act, something positive, not a mere omission.

Burton v. *State*, 62 So. 394, 395, 8 Ala. App. 295.

The word "attempt" means an act intended to effect the crime.

Tharpe v. *State*, 30 S. W. (2d) 865, 182 Ark. 74, 79;
People v. *Anderson*, 37 P. (2d) 67;
Hammond v. *State*, 171 S. E. 559, 47 Ga. App. 795;
Alford v. *Commonwealth*, 42 S. W. (2d) 711, 240 Ky. 513;
State v. *Lourie*, 12 S. W. (2d) 43;
State v. *Hudson*, 151 A. 562, 103 Vt. 17.

The word "attempt" implies both purpose and effort.

2 *Bishop New Cr. Prac.*, 4th Ed., Sec. 80.

Some act is necessary.

State v. *Thompson*, 118 Kan. 256, 234 P. 980.

United States v. *Quincy*, 31 U. S. 445, 465, 6 Pet. 445, defines the word as follows:

> "To attempt to do an act does not, either in law or in common parlance, imply a completion of the act, or any definite progress toward it. Any effort or endeavor to effect it will satisfy the terms of the law."

The essentials of the felony described in Section 145(b) have never been clearly defined. The language of the statute is not self-definitive. For definition of the word

"attempt" resort must be had to the common law. There is no other source from which a definition could be drawn under our law and no other means by which the language used could be interpreted and defined.

It may be added that the courts in several instances have declared that the misdemeanors defined in Section 145(a) are different from the felony defined in Section 145(b).

> *United States* v. *Capone*, 93 Fed. (2d) 840, 841;
> *O'Brien* v. *United States*, 51 Fed. (2d) 193, 196.

In the *O'Brien* case, supra, the court affirmed a judgment of conviction for both the misdemeanor of failing to make a return and the felony of wilfully attempting to defeat and evade the tax. The majority conceded this proposition:

> "The offense of willful failure to file an income tax return is not the same as a willful attempt to evade and defeat an income tax."

If the construction of the statute made below is allowed to stand anyone who omits to pay $1 tax may be held to have committed both the felony and the misdemeanor by the single omission of duty. The cases ordinarily prosecuted under this felony statute heretofore involved dishonest books, false entries in books, false income tax returns and various schemes and conspiracies, by which the Government would be prevented from discovering the taxpayer, his income and his tax liability. The felony statute has never been held to include a citizen like petitioner, who made himself known as a potential taxpayer by obtaining extensions of time to file his return from the Collector of Internal Revenue and who did no act of deception or concealment to cover up his liability or his property. If the statute were intended by Congress to embrace such cases clear warning of its intention must be given in the statute itself.

> *Crooks* v. *Harrelson*, 282 U. S. 55, 61;
> *Crawford on Statutory Construction*, Sec. 242, p. 472;

McBoyle v. *United States*, 283 U. S. 25, 27;
United States v. *Merriam*, 263 U. S. 179, 187-188;
Partington v. *Attorney General L. R.*, 4 H. L. 100, 122.

In *Crooks* v. *Harrelson*, 282 U. S. 55, 61, a civil tax case, this court said:

> "Finally, the fact must not be overlooked that we are here concerned with a taxing act, with regard to which the general rule requiring adherence to the letter applies with peculiar strictness."

In *McBoyle* v. *United States*, 283 U. S. 25, 27, the Supreme Court reversed a judgment of conviction and stated the principle applicable and the underlying reason:

> "Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear."

It is urged that the statute must be construed so as to require for the proof of the felony defined in Section 145(b) more than mere proof of the misdemeanor defined in Section 145(a).

Furthermore, since the word "attempt" is not defined in this statute and would, therefore, ordinarily be held to have the meaning uniformly given at common law, any construction of that statute which would give it a different meaning, would render the statute so uncertain in its meaning and application as to be unconstitutional.

In view of the dominant nature of the question of statutory construction heretofore argued, it may be unnecessary to discuss at length the other questions presented. However, it is not intended to slight them. The question of petitioner's mental condition bore directly on the wilfulness of his alleged act, assuming that there was any

act. There was ample proof as to the mental condition of petitioner and the fact that this condition affected his wilfulness. An expert of unquestionable standing testified that his condition would affect his power to do things required of him under the income tax law. The court below was asked for specific instructions, which would give the jury the tests by which it could determine whether his mental condition precluded wilfulness on his part or had any effect on the alleged wilfulness (R. p. 394, fols. 1181-1182). An exception was taken to the court's failure to instruct the jury as requested (R. p. 409, fol. 1226). The Court failed to give the requested instructions or to give any instruction at all upon the subject, by which the jury might be guided in testing the effects of petitioner's condition.

CONCLUSION

It is urged that the petition presents an important question of Federal law of wide application and public interest, which has not been decided by this Court, a serious conflict between the opinions of the various judges who have passed upon this question and serious doubt in their minds as to the proper construction of the statute. It is urged further that the construction of the words of the statute in the courts below conflicts with applicable decisions of other courts and with the common law. For these reasons it is urged that the questions presented and the conflict of opinions with respect to them require the exercise of this Court's supervisory jurisdiction.

Respectfully submitted,

DAVID V. CAHILL,
Attorney for Petitioner.